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No. 91-1160

In The

# Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

*Petitioner,*

v.

THOMAS E. CREECH,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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## ARGUMENT

### I.

### The Idaho Supreme Court's Limiting Construction Of The "Utter Disregard" Factor Properly Relies On A Constitutionally Acceptable Exercise Of Sentencing Judgment, Employing Terms That Are Not Vague

Whether a state court's limiting construction of an aggravating factor is too vague to give meaningful guidance to the sentencing authority is not settled by the circumstance that the descriptive terms employed may be thought to be subjective. Objective guidance can be given by terms that are less than precise, as is illustrated by the limiting constructions considered in *Walton v. Arizona*, 497 U.S. 639 (1990). For this reason, the Idaho Supreme Court's *Osborn* limiting construction is not unconstitutionally vague because the terms used are subjective in the sense that they require the sentencer to exercise judgment about whether the proven facts establish that the murder was reflective of the "utmost callous disregard for human life" by a "cold-blooded, pitiless slayer." *State v. Osborn*, 631 P.2d 187, 201 (1981). This is especially so when the Idaho Supreme Court took pains to instruct sentencing courts in the state that the phrase "utter disregard for human life" must be interpreted to set capital murders apart from others, citing *Godfrey v. Georgia*, 446 U.S. 420 (1980), and that "utter disregard" could not be proved solely by the existence of another capital aggravating factor.

There is an important distinction between *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Godrey*, on the one hand, and *Walton*, on the other, that lies in the difference between what Judge Trott called "pejorative adjectives"

and meaningful descriptions of the state of mind of the criminal actor. Words like "heinous," "depraved," and "perverse" are especially lacking in well-understood meaning. "Depraved," for example, is commonly defined as "corrupt, wicked, or perverted," *Webster's Encyclopedic Unabridged Dictionary of the English Language*, p.388, while "heinous" means "hateful; odious; abominable; totally reprehensible." *Id.*, p.658. Such terms do not define a killer's state of mind. Moreover, they derive their meaning from the potentially wide-ranging impressions of the hearer and, for this reason, are particularly difficult to apply when the object is to identify a high degree of culpability in a principled manner. The Idaho Supreme Court, on the other hand, defined "utter disregard for human life" as being "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *State v. Osborn*, 631 P.2d 187, 201 (1981). These are not merely pejorative adjectives, they are descriptive of provable states of mind. "Callous" is defined as "a. hardened insensibility: feeling no emotion, b. feeling no sympathy for others: without regard for the feelings or welfare of others: indifferent to the suffering of others." *Webster's Third New International Dictionary, Unabridged*, 1986, p.319. "Cold-blooded" similarly refers directly to the culpability with which the killer acted: "a. marked by absence of warm feelings: without consideration, compunction, or clemency: unfeeling, callous, hardened, cruel, b. matter of fact, emotionless." *Id.* at 442. These characteristics can be proved by facts such as Creech's staging of a pretext to kill Jensen or his brutal battering of Jensen after he was entirely helpless. It is no



more important from the standpoint of principled decision making to limit such proof to a list of specific acts than it would be to so limit proof of such states of mind as malice aforethought or premeditation. This much is acknowledged by the Court's approval of the use of subjective state of mind descriptions to narrow the meaning of the terms "heinous" and "depraved." *Walton, supra.*

The criteria are rational in that they focus the sentencer's attention on attributes of the defendant's state of mind and therefore narrow the decisionmaker's judgment as to whether the defendant's acts cross the death sentencing threshold. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987). The guided discretion requirement, as the Court has said, does not place totally unrealistic conditions on the use of capital punishment. *Gregg v. Georgia*, 428 U.S. 153 (1976).

## II.

### The Constitution Does Not Require That Capital Aggravating Factors Be Defined With Reference To Identified Factual Circumstances

The sole structural support for the respondent's argument as well as for the decision of the Court of Appeals is the premise that this Court's cases compel the conclusion that a valid state judicial construction limiting the reach of a statutory aggravating factor must be one which is constrained "by reference to circumstances capable of objective determination." (Respondent's Brief, p.6.) Creech extends this qualification beyond its former meaning with the contention that "circumstances capable of

objective determination" are those proved by "particular facts" or "specific acts." (Respondent's Brief, p.8; *Creech v. Arave*, 947 F.2d 873, 884 (9th Cir. 1991). Creech's theory, which is that of the Court of Appeals, is dependent upon references to "clear and objective standards" and "specific and detailed guidance" appearing in *Godfrey v. Georgia, supra*, and *Gregg v. Georgia*, 428 U.S. 153 (1976). These terms, however, are not self-defining and Creech cannot escape the context in which they have been set in this Court's cases. Instead of requiring the mechanical approach urged by respondent, the Court has required that states adopt procedures to ensure that the death penalty is not imposed arbitrarily or discriminatorily. *Barclay v. Florida*, 463 U.S. 939 (1983). Thus, when the court has used the terms "specific and detailed guidance" and "objective standards" it has been to describe the overall effect of a complete procedural system and *not* to require that each statutory aggravating circumstance be purged of all subjective influences. In *Proffitt v. Florida*, 428 U.S. 242, 253 (1976), for example, the court described a Florida statute, generally, by saying "under Florida's capital sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." 428 U.S. at 253. The Florida statute under consideration contained subjective aggravating factors.[1] Likewise, the "clear and objective standards" language, which comes from *Gregg v. Georgia, supra*, was used to

[1] "Great risk of death to many persons," Fla. Stat. Ann. § 921.141(5) (Supp. 1976-1977); "was especially heinous, atrocious or cruel." *Id.*



characterize Georgia's entire sentencing system, which included subjective factors, and not to set down a requirement for factual definition of aggravating circumstances. To the contrary, the court acknowledged that the sentencer had *not been deprived* of discretion:

> While some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." [Citation omitted.] 428 U.S. at 197-198.

Even in Godfrey, the court did not hold that "depravity of mind" as a criteria for applying an 'outrageously or wantonly violent" aggravating factor required a specification of facts that would prove depravity. The court held only that depravity of mind had not been defined and applied in such a way that it could be used to distinguish, in a principled way, cases in which the death penalty could be consistently imposed from the many cases for which the death penalty was not justified. 446 U.S. at 433. In *Maynard*, moreover, the Court pointed out that it was not requiring even the "especially heinous" factor to be limited by specific physical acts: "We . . . do not hold," the Court explained, "that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable." 486 U.S. at 356.

Contrary to the Court of Appeals' supposition that discretionary judgment must be removed from the state trial court in favor of listing specific acts in order to prove "utter disregard for human life", this Court has stated that it did not intend to demand mathematical precision in the process of applying statutory aggravating factors.

*Walton, supra.*[2] The question, particularly in a judicial sentencing system is "whether [the state court's definitions of vague terms] provide *[s]ome* guidance to the sentencer." *Walton,* 111 L.Ed.2d at 529 (court's emphasis). The court has disavowed any intent to force states into a particular statutory mold, to require any particular kind of statutory structure or to require mathematical precision in the definition or application of statutory aggravating factors. Cf., *Pulley v. Harris,* 465 U.S. 37 (1983) (a state may choose whether or not to employ comparative proportionality review of death sentences); *Spaziano v. Florida,* 468 U.S. 447 (1988) (a state may choose to permit the determination of penalty by a judge rather than by a jury); *Cabana v. Bullock,* 474 U.S. 376, 386-387 (1985) (state may provide for making requisite findings of culpability at the appellate stage of the proceedings).

Apart from the respondent's error in contending that this Court's cases require factual limitation of the *Osborn* construction, his theory overlooks a traditional aspect of sentencing law. Although Creech insists otherwise, the judicial power to make a reasoned judgment about culpability was not taken away from the state courts by the

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[2] The decision of the Court of Appeals evidences substantial distrust of the ability and willingness of state judges to follow the Constitution. In effect, the state has been told that its limiting construction must be rewritten to define the facts that will prove a cold-blooded state of mind. Although one judge of the Court of Appeals has suggested that state courts are not to be trusted with constitutional adjudication, justifying more expansive federal review, *Coleman v. McCormick,* 874 F.2d 1280, 1295 (9th Cir. 1989), Reinhardt, J., concurring, Cert. denied, 493 U.S. 944 (1989), this is clearly not an accepted view in this Court. *Clemons v. Mississippi* 494 U.S. 738 (1990).



Eighth Amendment or by any other provision of the federal constitution.

There is traditional acceptance that evaluating the mental state with which the defendant acted is an exercise of sentencing judgment unencumbered by any requirement that a list of so-called objective facts be checked off. The essence of determining personal culpability is to question whether the defendant behaved callously, cold-bloodedly, with premeditation, or in accordance with any number of similar factors. This principle was emphasized in *Tison v. Arizona,* 481 U.S. 137 (1986):

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply engrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. 481 U.S. at 156.

*Tison* was concerned with whether persons who had not actually killed, having been convicted on a felony murder theory, could be sentenced to death consistently with Eighth Amendment ideas of personal culpability. The governing criteria was defined by a term no less subjective than "utter disregard for human life":

> The reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result. 481 U.S. at 157-158.

The case was remanded to the Arizona Supreme Court to determine whether there was "reckless indifference" in the acts of the defendant.[3] On remand, no claim appears to have been made that "reckless indifference" would require further definition by the Arizona Supreme Court. *State v. Tison*, 774 P.2d 805 (Ariz. 1989)

The precedents reflect that the exercise of sentencing discretion is a process by which it is recognized that such language of moral culpability as "malice" or "heinousness" or "cold-bloodedness" reflects social intuition about degrees of culpability and that the validation of such intuition is a critical aspect of judgment:

> Rough judgments of the relative culpability of acts, by which I mean to include the contemporaneous state of mind of the actor, have long been integral to the criminal law. These judgments at their roughest level separate misdemeanors from felonies, and on a more refined level, various degrees of an offense. That these judgments reflect more widely held views in the society at large is confirmed by our intuitions (robbing a bank seems different from stealing a package of gum; negligent acts resulting in harm or death seem different from purposeful or knowledgeable acts with similar outcomes) . . . If it is not illogical to use deliberation or premeditation to distinguish first degree murder from second degree murder, and the fact

[3] Petitioner does not imagine that anyone would be long detained by the notion that a constitutional principle should turn on whether "reckless indifference" is more or less specific than "utter disregard."



> that most legislatures have done so indicates that the distinction captures a widespread intuition, why is it illogical to use "especially heinous, atrocious or cruel" to distinguish capital murder from first degree murder? Moreover, why would we not think that this distinction likely captures another distinction? The answer is obvious: it is not illogical at all to make the distinction, and it probably does capture a widely held intuition. Allen, Foreword – Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: the Intriguing Case of Walton v. Arizona, 81 Journal of Criminal Law and Criminology, 727, 740-741 (1991).

The development of the concept of moral culpability as an aspect of sentencing discretion was reviewed in *McGautha v. California*, 402 U.S. 183 (1970). Justice Harlan, who wrote the court's opinion upholding the broad exercise of capital sentencing discretion, observed that:

> Those who have come to grips with the hard task of actually attempting to draft a means of channeling sentencing discretion have confirmed the lesson taught by history. . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. 402 U.S. at 204.

When it was decided to impose upon the states a requirement for narrowing the exercise of sentencing discretion, it was not because the court wished to remove from the sentencing process the sentencer's power to

make judgments about the defendant's moral culpability. Instead, the court sought to eliminate elements of discrimination and arbitrariness that were thought to have tainted the exercise of discretion. *Furman v. Georgia,* 408 U.S. 238 (1972). Thus, in *Gregg v. Georgia, supra,* the object was described as one of guiding or channeling the exercise of discretion by the sentencing authority. In *Proffitt v. Florida, supra,* the court concluded that the sentencer's focus on "the individual circumstances of each homicide and each defendant," 428 U.S. at 252, was important, and judicial sentencing was likely to lead to greater consistency "since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Id.*

*Lockett v. Ohio,* 438 U.S. 586 (1977), carries forward the principle that a capital sentencing judgment must be guided by the inquiry into moral culpability and that this inquiry "requires consideration of the character and record of the individual offender and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the death penalty." *Lockett,* 438 U.S. at 604, *quoting Woodson v. North Carolina,* 428 U.S. 280, 289-298 (1976).

In *Walton, supra,* the court found that terms leaving it to the sentencing authority to make such judgments about culpability ("mental aguish" as a definition of "especially cruel"; "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" to define "especially depraved") were constitutionally sufficient terms because they gave "meaningful



guidance to the sentencer." 111 L.Ed.2d at 529. These terms obviously do not describe particular acts at all. They are terms describing states of mind to be applied by a sentencing judge assessing moral culpability according to the intuitive understanding of society that relishing killing, debasement and perversity are identifiable mental states that are not present in most murders and thus set apart the worst offenses. Creech's effort to persuade this court that "evidence of debasement or perversion" and evidence of "a sense of pleasure in the killing" amount to descriptions of particular acts while evidence of "callousness," "cold-bloodedness" and "pitilessness" do not brings to mind oft-repeated cautions against reducing the law to semantic quibbling. "[A]lmost any word or phrase may be rendered ambiguous by dissection with a semantic scalpel," *Cole v. Richardson,* 397 U.S. 238, 240 (1970) but "condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972).

This history leaves no room for respondent's contention that sentencing discretion has been so constricted by this Court's cases that the issue of personal culpability must be taken away from the sentencing judge, whose judgment reflects society's intuitions about callousness and cold-bloodedness, and replace it with an inflexible list of factual predicates.

## III.

**It Can Be Presumed That The Idaho Courts Knew And Applied The Requirements Of Federal Constitutional Law To Creech's Sentence; The State's Courts Are Capable Of Principled Application Of The "Utter Disregard" Factor**

It is implicit in *Walton* that judicial sentencing, as contrasted with jury sentencing, brings to the sentencing process the additional advantage that the sentencer may be presumed to know the law and to recognize that limiting terms must be interpreted according to their narrowest meaning and not their broadest meaning. The Court, in *Walton*, distinguished the Arizona sentencing procedure from those in *Godfrey* and *Maynard* because Arizona employed judicial sentencing and its appellate courts had announced limiting constructions of the state's "heinousness" factor that gave some guidance to the sentencer. If it is appropriate to presume that sentencing courts and state reviewing courts know the limiting constructions previously settled, it is also appropriate to presume that they know and apply this Court's constitutional precedents. Cf. *Clemons v. Mississippi*, 484 U.S. 738, 749 (1989) (We conclude that State appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime."); *Profitt v. Florida*, 428 U.S. 242 (1976) (Judges better equipped than juries to impose capital sentences in consistent fashion.)

In this light, the Court's approval in *Walton* of subjective terms of limitation, such as "depraved," defined as "relishes the murder, evidencing debasement or perversion," and its characterization of the use of these terms as



sufficiently objective guidance, must be taken as contrary to the Court of Appeals' position.

Respondent argues that the cases decided by the Idaho Supreme Court establish that the "utter disregard" factor is overbroad and standardless. He draws this conclusion from the circumstance that the factor has been applied in widely varying factual situations. But the inference is not sustainable. Inasmuch as the defendant's state of mind is the basis of the "utter disregard" factor, it makes no difference whether one acting callously, cold-bloodedly, or pitilessly planned the murder well in advance, or only a short time in advance; whether the victim was a child or an adult; whether there were multiple victims or a single victim; whether the defendant lay in wait or did not; or whether he acted without provocation or upon pretextual provocation. The requisite state of mind was present in all the cases respondent cites in support of his claim that the "utter disregard" factor has been applied inconsistently. The point of consistency is the fact that all these applications of the "utter disregard" factor were based on the killers personal culpability. See *State v. Fetterly*, 710 P.2d 1201 (Idaho 1985); *State v. Paz*, 798 P.2d 1 (Idaho 1990); *State v. Fain*, 774 P.2d 252 (Idaho 1989); *State v. Lankford*, 781 P.2d 197 (Idaho 1989); *State v. Pizzutto*, 810 P.2d 680 (Idaho 1991); *State v. Creech*, 670 P.2d 463 (Idaho 1983) *rehearing denied* (1983), *cert. denied*, 465 U.S. 1051 (1984).

The argument made on this point by respondent is another indication of the fault of the "fact-list" theory. It does not make a difference for purposes of assessing culpability whether one possessing the requisite state of mind has that state of mind in one or another factual situation.

## IV.

### Any Error In The Idaho Court's Application Of The Utter Disregard Factor Would Be Harmless

As Creech correctly observes, Resp. Br., pp. 29-30, the Idaho Supreme Court did not have reason to reweigh those aggravating circumstances remaining after omission of the "utter disregard" factor, or to consider whether the finding was harmless error. But this does not dispose of the question. This Court may consider the harmless nature of the error, should it decide that the Idaho court's limiting construction of the "utter disregard" factor was inadequate. Upon review of the record, the Court held in *Milton v. Wainwright*, 407 U.S. 371 (1972) that the erroneous admission of evidence against a habeas petitioner was harmless beyond reasonable doubt, for which reason the Court did not reach the merits of the constitutional claims. The limited nature of federal habeas review suggested special reason for harmless error analysis:

> The writ of habeas corpus has limited scope: the federal courts do not sit to retry state cases *de novo* but, rather to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not challenged here; the use of additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless. 407 U.S. at 377.

The principle stated in *Milton* is particularly applicable here. The Idaho Supreme Court, in the process of determining whether Creech's death sentence was both



proportional and just, stated that it had never before been confronted with "any such remorseless, calculating, cold-blooded multiple murderer." *State v. Creech, supra*. The court held that none of its recent precedents suggested a basis for leniency in Creech's case. *Id.* "We find no instance in which a defendant found guilty of such previous crimes as those of Thomas Creech has been found deserving of a sentence less than death." *Id.* This language is clear evidence that the Idaho Supreme Court would have upheld Creech's sentence solely on the basis of the "propensity" factor. Were this case to be returned for resentencing, Creech would doubtless again be sentenced to death with no more than formality of revising the language of the sentencing findings.

This position is not diminished by Respondent's assertion that Idaho is a "weighing" state in which either the supreme court or the trial court might reach a different conclusion about the death penalty if the "utter disregard" factor were not available. Although Respondent seems to argue that reliance by the sentencer on an invalid aggravating factor always demands reversal of a death sentence in a "weighing" state, unless the state supreme court has conducted harmless error review, the argument is not correct. This Court may examine the record for harmless error, *Milton, supra*, and it is appropriate that it do so on federal collateral review where the state court has conducted independent review, for both proportionality and the justice of the sentence, and has announced, in effect, that it would uphold the death sentence solely on the basis Creech's propensity to commit murder.

*Clemons v. Mississippi, supra,* holds that in a "weighing" state a sentence is tainted by the sentencer's reliance on an invalid aggravating circumstance to the extent that a reviewing court must either reweigh or find harmless error. In *Sochor v. Florida,* 112 S.Ct. 2114 (1992) the Court vacated a death sentence where the Florida Supreme Court had invalidated one of multiple factors and had not made clear whether it had reweighed the remaining factors or conducted harmless error review. These cases express the Court's concern that individualized consideration of the merit of the death sentence may be diminished by uncertainty about the extent to which an invalid aggravating factor affected the sentencer's deliberations.

A different approach has been taken in states like Idaho where the finding of an aggravating factor is a threshhold event, following which the sentencer has the discretion to decline to impose the death penalty for any reason, and where independent review for arbitrariness provides assurances that excessive sentences will be set aside. *Zant v. Stephens,* 462 U.S. 862 (1982). Although there is statutory language calling upon the sentencer in Idaho to consider whether "mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found," Idaho Code § 19-2515(c), the sentencer has statutory notice that each aggravating factor is alone enough to trigger consideration of the death penalty. *Id.* In Idaho, as in Georgia, the sentencer is not instructed by law "to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Zant v. Stephens, supra* 462 U.S. at 874; *State v. Sivak,* 674 P.2d 396 (Idaho 1983). By contrast, in weighing states such as Mississippi and Florida, the sentencer is instructed to consider generally whether the circumstances from a statutory list are "sufficient" to justify the death penalty. The statutory language leaves room for the sentencer to conclude that some aggravating factors have greater weight than others, thus creating the possibility that the sentencer may impose the death penalty in some cases only because of a cumulation of factors which could be affected by the removal of one or more of them from consideration. See Miss. Code Ann. § 99-19-101(2)(b) (Supp. 1992); Fla. Stat. § 921.142(3).



The Idaho Supreme Court's unequivocal statement that Creech was, in its view, the worst of capital offenders calls for application of the principle that a reviewing court in a non-weighing state may uphold a death sentence on independent review without complying with the plain statement rule of *Sochor,* even if the Court were to decide against the "utter disregard" factor. *Zant v. Stephens, supra.*

## V.

## The Application Of The "Utter Disregard" Factor To The Evidence Is Not Properly An Issue In This Court

Creech's contention that the evidence was insufficient to support the "utter disregard" factor raises an issue of factual interpretation which is outside the scope of federal review because, as the Court held in *Lewis v. Jeffers,* 111 L.Ed.2d 606 (1990), "where the issue is solely whether a state court has properly found the existence of constitutionally narrowed aggravating circumstance, we

have never required federal courts 'to peer majestically over the [state] court's shoulder so that [they] might second guess its interpretation of facts that quite reasonably – perhaps even plainly – fit within the statutory language.' " 111 L.Ed.2d at 623.

The interpretative factual description advanced by Creech is that he was the victim of an "unprovoked" first attack by Jensen. But the Idaho Supreme Court did not, as Creech contends, find that the murder was other than callous, cold-blooded, and calculated. Although the supreme court remarked that the *district judge* had not found that the murder "had been performed on contract or by plan," 670 P.2d at 465, the court found (1) that the record "clearly supports the trial court's findings of aggravating and mitigating circumstances and (2) upon its own independent review of the facts it was possible to say that Creech was more "remorseless, calculating and cold-blooded," than any other murderer whose case had been considered by the court in the past fifty years. 670 P.2d at 470; 476.

The record of the preliminary hearing, which, given Creech's guilty plea, was the only place other than the sentencing hearing where evidence of the crime was formally taken, showed that Creech, after giving inconsistent versions of the killing, admitted that (1) he disliked Jensen, (2) he had been advised by another inmate to "do Jensen in," (3) he had caused Jensen to believe he was in danger from Creech, (4) he had given a sock full of batteries and a toothbrush with a razor blade attached to an inmate named Balla, (5) Balla, in turn gave the weapons to Jensen (who was not capable of using them effectively) and (6) when Jensen came out of his cell,



Creech, predictably, took the weapons away from Jensen and beat him to death. See Exhibit W, Supplemental Excerpt of Record, pp. 77-83. This background, if nothing else, at least demonstrates that Creech's invitation to reinterpret the facts before the Idaho Supreme Court cannot be taken seriously. If the "utter disregard" factor is unconstitutionally vague, the evidence supporting it is of no moment. Otherwise, the proper interpretation of the evidence is a question of state law.

## CONCLUSION

The judgment of the Court of Appeals should be reversed to the extent it orders that Creech's death sentence be vacated.

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